NO. 22727

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HON. FRANCIS C. WHELAN, PRESIDING

DAVID B. FINKEL
849 South Broadway, Suite 412
Los Angeles, California 90014

Attorney for Appellee

HUGH R. MANES
6331 Hollywood Blvd., Suite 1112
Los Angeles, California 90028

Of Counsel

NO. 22727

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

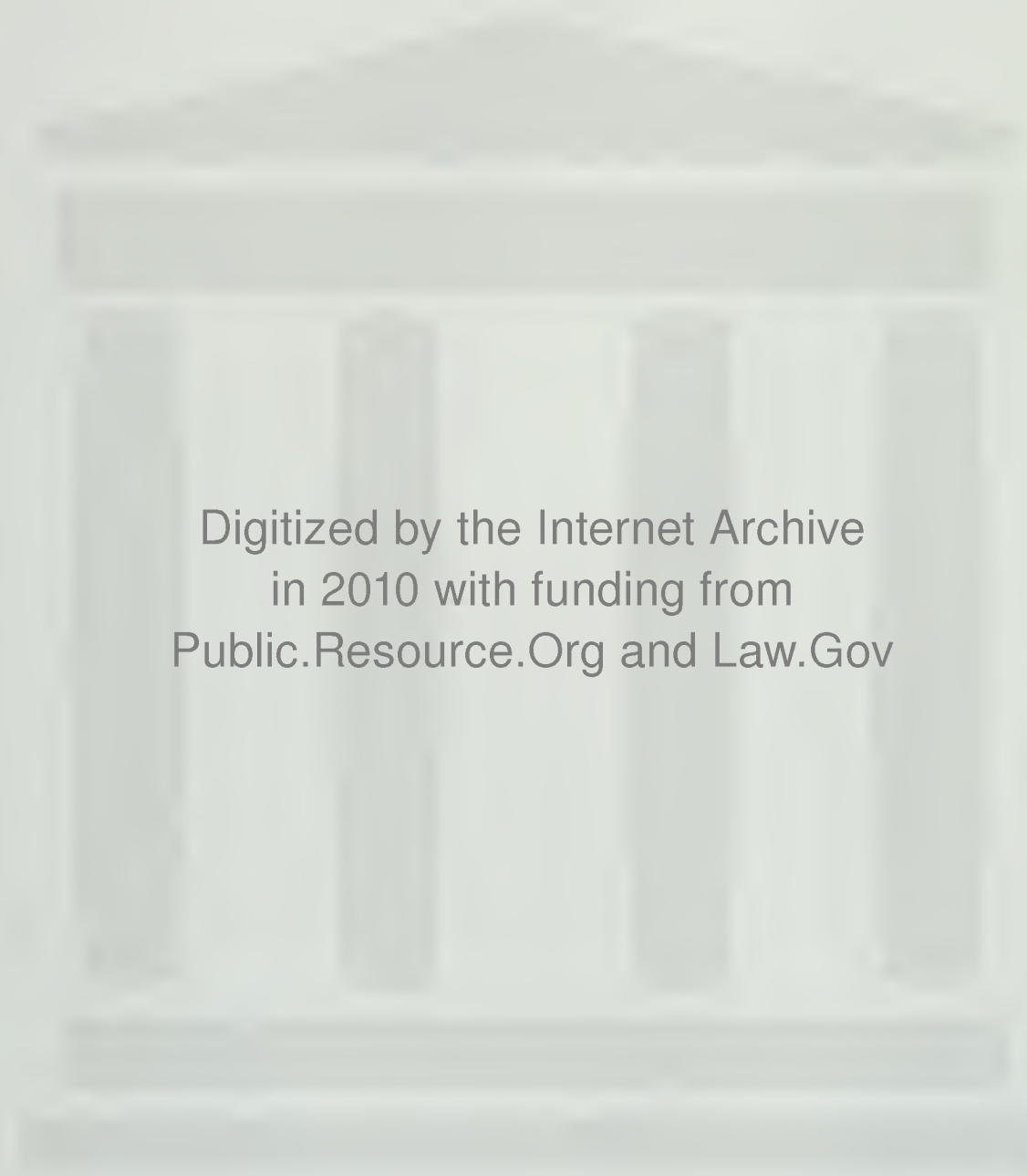
HON. FRANCIS C. WHELAN, PRESIDING

DAVID B. FINKEL
849 South Broadway Suite 412
Los Angeles, California 90014

Attorney for Appellant

HUGH R. MANES
6331 Hollywood Blvd., Suite 1112
Los Angeles, California 90028

Of Counsel



TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes

NO. 22727

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

NATURE OF THE CASE

Appellant was convicted of violation of 50 U.S.C.A. App. §462 (failure to submit to induction), and sentenced to prison for three years. He appeals therefrom, contending that the Local Board's order to report for induction was invalid, because, among other things, the Local Board failed to meet and consider his request for reopening of his classification, that said order was issued before the expiration of his appeal rights, and because the failure of the Local Board to reopen appellant's classification was arbitrary.

////

JURISDICTION

An indictment was filed on May 25, 1967, in the United States District Court for the Southern District of California, Central Division, No. 37153, charging appellant with violation of the Universal Military Training and Service Act (50 U.S.C.A. App. §462) in that he ". . . knowingly failed and neglected to perform a duty required of him under said act," by refusing to submit to induction on March 15, 1966, in Los Angeles County, after having been duly classified I-A by his Local Selective Service Board, and after having been duly notified and ordered to report for induction at said date and place (C.T. 1-2). [1]

Appellant was arraigned on said indictment on June 19, 1967, and plead not guilty (C.T. 3).

The case came on for court trial on October 5, 1967 before the Honorable Francis C. Whelan, District Judge presiding (C.T. 34), jury trial having been duly waived (C.T. 28, 35).

After evidence was received, and the government and defendant had rested, the case was continued for further proceedings to October 12, 1967 (C.T. 34). On the latter date, the matter was submitted by the parties to the Court for decision (C.T. 36).

1. C.T. refers to the Clerk's Transcript on file herein, and the numbers signify the pages thereof on which the cited reference may be found.

On November 29, 1967, the court found appellant guilty. Appellant then waived a pre-sentence report, and after he and counsel had made statements, the court sentenced appellant to imprisonment for three years (C.T. 37, 38). [2]

Notice of Appeal was filed on December 6, 1967 (C.T. 39).

Jurisdiction of the District Court arose under 18 U.S.C.A. §3231. Review is sought here pursuant to 28 U.S.C.A. §§1291, 1294.

PROCEEDINGS IN THE TRIAL COURT

The Trial

The Government's case consisted solely of appellant's Selective Service file, received in evidence without objection as Exhibit "1" (R. 9/7-20, 10/2-3), [3] (supplemented by

---

2. The record does not include a Reporter's Transcript of the proceedings held on either October 12 or November 29, 1967, despite appellant's apparent request therefor (C.T. 40, 45).

3. "R" refers to the Reporter's Transcript, consisting of two volumes, of the oral proceedings had at trial on October 5, 1967. The numbers to the left and right of the slant bar refer, respectively, to the pages and lines thereof on which the cited reference can be found.

the Government's Pre-Trial Memoranda [C.T. 9-24]), and an F.B.I. investigative report, received in evidence in lieu of testimony pursuant to stipulation, as Exhibit "2" (R. 10/4-25, 11/6-7). With that, the Government rested (R. 11/10-11).

The defense thereupon filed and served a written motion for judgment of acquittal (R. 11/13-16), setting forth eleven grounds therefor (C.T. 22-23).

After first reserving ruling thereon, the court appears to have denied the motion without prejudice because requiring oral evidence (R. 11/20-12/6). The record does not disclose whether the motion was formally renewed or whether any further rulings were made thereon.

The defense case consisted of appellant, who testified in his own behalf (R. 20-47), and the testimony of the clerk of appellant's Local Selective Service Board [No. 118] (R. 12-20). Three documents subpenaed by appellant from appellant's Local Board were identified by the latter witness, and marked as Exhibits "A", "B" and "C", respectively (R. 16/10-13, 16-25; 17/11-14); but apparently none of the exhibits were offered or received into evidence and no further reference thereto seems to have been made by either party.

The balance of the trial, including the second volume of the Reporter's Transcript, was taken up with argument on the legal issues.

SUMMARY OF THE CASE

Appellant, a United States citizen by birth, was born on May 18, 1938, and registered (as a high school student) for Selective Service on May 22, 1956 (S.S.F. 2-3). [4] In his classification questionnaire (Form No. 100), filed June 10, 1957, appellant indicated he was a full time pre-dental student at U.C.L.A., but he did not claim that he was a conscientious objector (S.S.F. 10-11). On June 3, 1959, appellant's Local Selective Service Board (No. 118) classified him as I-A; but in November of that year, appellant was reclassified II-S (student deferment) (S.S.F. 12).

Appellant's II-S classification continued through September, 1964, during which period appellant attended and graduated from U.C.L.A. Medical School with a degree in medicine (S.S.F. 22-26, 30-31).

Appellant commenced his internship on July 1, 1964, at the University of Kansas Medical Center (S.S.F. 38), by reason of which he was reclassified on September 9, 1964 as II-A (occupational deferment) to July, 1965.

In the fall of 1964, the Board ordered appellant to take a pre-induction physical, and he was ultimately found acceptable on March 29, 1965 (S.S.F. 36, 40-42, 48). However

4. S.S.F. refers to appellant's Selective Service file received in evidence during the trial as Exhibit "1" (R. 10/2-3) and the numbers refer to the encircled page numbers therein.

appellant was reclassified I-A on Jan. 6, 1965, and a Form 110 notifying him thereof was mailed on the same date (S.S.F. 12, 13). Appellant did not appeal from said classification, but on March 5, 1965, he wrote his Local Board inquiring as to the reason for his reclassification from II-S (sic) to I-A, "and what it means" (S.S.F. 43). The Board replied on March 10, 1965, stating that:

> "Reclassification was undertaken in the light of the evident need for physicians in the Armed Forces. You will not be denied the opportunity to complete your internship even though you are classified in I-A" (S.S.F. 45).

On April 13, 1965, appellant's Local Board sent him an order to report for induction on July 1, 1965, together with a letter advising him of the opportunity for a naval commission (S.S.F. 50-51). On April 27, 1965, appellant's Local Board was informed by Cedars-Sinai Medical Center in Los Angeles, California that appellant had been accepted there as a resident doctor training in pediatrics (S.S.F. 60-61). The Board wrote the State Director for instructions and was advised by letter to cancel appellant's induction notice, and to change appellant's classification upon receiving confirmation of his actual employment (S.S.F. 61).

On April 29, the Local Board sent appellant notification that his induction orders had been cancelled; and on August 4, 1965, appellant was reclassified II-A to

August, 1966 (S.S.F. 13).

On October 7, 1965, appellant's Board received a request from the State Director to forward appellant's files for review (S.S.F. 76). On that date, the Board ordered appellant to report for a pre-induction physical on October 23, 1965 (S.S.F. 78).

On October 20, 1965, the State Director returned appellant's file to the Local Board with an accompanying letter "recommending" that appellant "be considered for reclassification" as I-A, that is, available for induction, and requesting a return of the file for further review "if this physician is classified in a class other than I-A or I-A-O." (S.S.F. 80)

On October 25, appellant wrote his Board a letter explaining that he was unable to report for his physical because of a conflict with his duties at the hospital (S.S.F. 81). A second notice was sent (to the wrong address), and this appointment was apparently kept for he was ultimately found acceptable for service (S.S.F. 84, 89).

On November 29, 1965, the Local Board received a letter from appellant's superior, the Director of the Division of Pediatrics at Cedars-Sinai Medical Center, stressing the need for trained pediatricians and requesting that appellant's deferment be maintained to allow him to complete his training in that field to July 1, 1967 (S.S.F. 86-88).

On January 24, 1966, the Local Board voted 2-0 to reclassify appellant I-A, and sent him a notice of said classification (S.S.F. 13). The record does not disclose whether he was advised of his right to appeal or to personal appearance; but on January 31, 1966, the Local Board received appellant's letter, appealing his reclassification to I-A from II-A "which I do believe I should be at this time." (S.S.F. 90)

The Appeals Board voted 3-0 to sustain a reclassification and on February 25, 1966, the Local Board mailed appellant another Form 110 notifying him of the Appeals Board's decision (S.S.F. 13).

On February 28, 1966, the Local Board sent appellant an order to report for induction on March 15, 1966 (S.S.F. 94).

On that same date, the Board received a letter from appellant, dated February 26, claiming status as a conscientious objector (I-O), and requesting that he be sent a Form 150 (S.S.F. 98).

Neither the induction notice nor appellant's said letter bear a time stamp. The Board's minutes showed typewritten entries in that sequence (S.S.F. 13).

A Form 150 was mailed to appellant on March 2, 1966 (S.S.F. 13, 104) directing the completion and return of same on or before March 8, 1966. On the latter date, the Board received appellant's Form 150, duly completed

and signed (S.S.F. 104-108).

On March 7, 1966, the Board received appellant's letter protesting the inadequacy of time allowed for completion of the Form 150, objecting to the treatment of his claim "as a late request", and asking that his induction notice be cancelled pending disposition of his conscientious objector claim (S.S.F. 99-100).

On March 11, 1966, the assistant coordinator of the Local Board mailed appellant a letter acknowledging "receipt of your communication relative to your Selective Service status," and notifying appellant that:

> "The information contained therein has been considered by this Board and it is of the opinion that the facts presented do not warrant the reopening or reclassification of your case at this time." (S.S.F. 110)

However, the minutes of appellant's file reflect the following entry after the date of March 10, 1966:

> "Board members contacted, file reviewed new information does not warrant reopening of classification, Must report for Induction as ordered (sic)."

Furthermore, it appears from the trial testimony of Mrs. Armand, the assistant coordinator of the Board, that no meeting of the Local Board was held following

receipt by the Board of appellant's application for reopening his classification; rather, Mrs. Armand contacted two of the three members by phone--the third member being unavailable--and polled them on the question of reopening (R. 18/23-19/19). An attempt by defense counsel to inquire into the substance of the telephone conversation was barred by the trial court's ruling (R. 19/6-9).

Appellant reported to the induction center on March 15, 1966, but refused to step forward (S.S.F. 113-114). He also refused a commission in the United States Navy (S.S.F. 130).

Appellant's prosecution and conviction followed.

SPECIFICATION OF ERRORS

1. Appellant was deprived of due process of law which vitiated his conviction by reason of:

(a) The failure of the Local Board to hold a meeting and consider thereat his request for reclassification as a conscientious objector;

(b) The failure of the Local Board to reopen appellant's classification after he presented new facts making out a prima facie case for classification as a conscientious objector;

(c) The issuance of an induction order by the Board prior to the expiration of appellant's time for administrative appeal.

2. The evidence is insufficient in that it does not support the allegation in the indictment that appellant failed and neglected to perform a duty required of him under §462 of 50 U.S.C.A. App., for all of the reasons set forth in Specification No. 1, and for the additional reason that the Local Board acted in excess of its jurisdiction by failing to comply with Selective Service Regulations which afforded appellant procedural due process rights.

QUESTIONS PRESENTED

1. Whether the telephonic polling of members of the Local Board by the clerk thereof on appellant's application for reopening of his classification constituted a meeting of the Local Board within the meaning of Selective Service Regulations §§1604.56, 1604.58 and 1625.2.

2. Whether appellant was deprived of due process of law and a full and fair consideration of his conscientious objector claim by the failure of the members of the Local Board to read or consider such claims at a meeting.

3. Whether appellant's application for classification as a conscientious objector made out a prima facie case therefor, and thereby required the Board to cancel appellant's order to report for induction, and to reopen appellant's classification and classify him anew.

4. Whether the Local Board's failure and refusal

to reopen appellant's classification was arbitrary and deprived him of his appearance and appeal rights under the Selective Service regulations, thereby vitiating his order to report for induction.

5. Whether appellant's induction notice was illegal and ineffective within the meaning of Selective Service Regulations §1626.41 by reason of having been mailed to appellant before his right to appeal under Selective Service Regulations §1626.61(b) had terminated.

MOTION TO REMAND TO TRIAL
COURT FOR FURTHER PROCEEDINGS

Appellant's Selective Service File (pp. 12-14) shows that for nearly four years, only two members of the Local Board voted on matters affecting appellant's status and classification. The record at bar does not disclose the reason therefor, and so counsel has attempted to determine whether the Board was properly constituted during said period, and particularly when voting on matters affecting appellant's classification and status. If, at such times, the Board was not composed of three or more members (Selective Service Regulations §1604.52), then it may well be that the Board had no jurisdiction to classify appellant or issue orders affecting appellant's status. (Compare: Brede v. United States, No. 21,928, decided 5/27/68 [9th Cir.].)

Counsel, who did not participate in the trial of this case, did learn from an assistant clerk of said Board, that for at least a portion of the period in question, the Local Board was comprised of only two members, the third having died. However, the clerk refused to disclose the extent or duration of the period during which only two members were on the Board, stating that she would disclose such information only upon order of her superiors or by court order.

Since this is a matter affecting the jurisdiction of the Local Board to issue valid induction orders, appellant respectfully moves that the case be remanded to the trial court for further proceedings and findings on this issue; and that such findings be transmitted to this Court, be made a part of the record, be briefed by the parties hereto, and be submitted with the other points raised herein, for decision by this Court.

/

/

/

/

/

/

/

/

/

/

/

/

/

ARGUMENT

I

THE TELEPHONIC POLLING OF THE MEMBERS OF APPELLANT'S LOCAL BOARD ON WHETHER HIS CLASSIFICATION SHOULD BE REOPENED WAS NOT A MEETING AS REQUIRED BY THE SELECTIVE SERVICE REGULATIONS AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW WHICH VITIATED HIS INDUCTION NOTICE AND HIS CONVICTION.

1. Selective Service Regulations §1604.56 provides, in pertinent part, as follows:

> ". . . A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification. . . If any member is absent so long as to hamper the work of the local board [the chairman shall recommend removal and appointment of a new member]."

S.S. §1604.58 provides:

> "Minutes of meetings--Each local board shall keep a record of each meeting of

the board on minutes of local board meeting (SSS Form 112) which shall be filed by the local board as minutes of its meetings."

S.S. Regulation §1625.2 states, in relevant part:

"The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant. . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification. . .".

2. Failure of the Local Board to comply with regulations which accord procedural rights to a registrant renders the registrant's classification and induction order invalid.

Franks v. United States,
C.A. 9th, 1954, 216 F.2d 266, 269;
Knox v. United States,
C.A. 9th, 1952, 200 F.2d 398, 401.

3. The telephonic polling of the members violated Selective Service Regulations §1604.56 in that the board members purported to decide a question affecting appellant's status and classification in the absence of a quorum.

a quorum presupposes a meeting. [5]

The aforecited regulations clearly anticipate a duly constituted meeting for the transaction of business affecting the registrant's classification, and even require that minutes be kept.

4. Not only does the evidence show that appellant's conscientious objector claim was not considered at a meeting of his Local Board, but there is not even evidence that any of the members discussed appellant's claim with each other, nor that they had even seen or reviewed appellant's claim.

Indeed, since the assistant coordinator of the Board telephoned two of the members (R. 18/23-19/19), the inference is compelling that the Board members themselves never read or reviewed appellant's claim before voting thereon. This inference is strengthened by the notation entered in the minutes of action appended to appellant's questionnaire for the date 3/10/66, indicating: "Board members contacted file reviewed. . ." (S.A.F. 14).

---

5. "64. A quorum of an assembly is such a number as must be present in order that business can be legally transacted. The quorum refers to the number present, not to the number voting." Roberts Rules of Order, Rev., Scott, Foresman & Company, 1951, at p. 257.

///

how much of the appellant's information was conveyed over the telephone to the two members voting thereon is unknown in that the clerk could not remember her conversation with the Board members (R. 10/5).

5. The registrant is entitled to have his claims fully and fairly considered and acted upon by his Local Board.

Ehrat v. United States, supra,
200 F.2d 390, 402.
United States v. Peebles,
C.A. 7th, 1955, 220 F.2d 114, 118, 120.

6. A Local Board cannot fairly consider a claim its members have neither seen nor discussed among themselves.

7. A mere telephonic vote does not satisfy the implicit requirements of Selective Service Regulations §1604.56 that all questions and classifications be decided by and at a meeting of the Local Board.

Welsh v. United States (D.C., Mass., 1968),
279 F.Supp. 115 (holding an almost
identical regulation, i.e., §1604.52(a)
(3)--was not satisfied by a telephonic
vote);
Compare: Irmis v. United States, supra,
holding an order to report for alternative
civilian work under S.S. §1660.20 (b)

to be invalid where not shown to have been issued at a meeting of the Local Board.

8. That telephonic decisions do not comply with Selective Service Regulations, and deny appellant's substantial due process of law, is recognized by the Selective Service system itself. Thus, Local Boards have been instructed by the California Headquarters of the Selective Service System, in an operation memorandum dated October 18, 1967, to hold special meetings and, if necessary, to postpone induction orders, in order to consider conscientious objector claims filed after the mailing of an induction notice. The memorandum above cited expressly admonishes Local Boards that: "A mere telephone review of the file is inappropriate."

More recently, State Headquarters issued an operation memorandum, dated June 10, 1968, relating to conscientious objector claims filed under S.S. §1625.2, and other regulations, a pertinent portion of which reads as follows:

> "In the event the completed SSS Form 150 is returned after an induction order is issued but before the induction date and there will be a regularly scheduled meeting of the local board before the induction date, the entire file and the Special Form

for Conscientious Objector shall be reviewed by the local board. If the form is returned prior to the induction date and there will be no regularly scheduled meeting of the local board before the induction date, the registrant's induction shall be postponed so that the local board can consider the information contained in the form at a regularly scheduled meeting."

9. For the foregoing reasons, therefore, it would appear that appellant was deprived of substantial procedural rights by the failure of the Board to make its decision on his application at a duly constituted meeting as required by Selective Service Regulations. Since the Board thereby acted in excess of its jurisdiction, the evidence is insufficient to establish that appellant failed and neglected "to perform a duty required of him under §462 of 50 U.S.C.A. App.".

/

/

/

/

/

/

/

/

/

/

/

/

/

II

APPELLANT'S FORM 150 MADE OUT A PRIMA FACIE CASE FOR CLASSIFICATION OF APPELLANT AS A CONSCIENTIOUS OBJECTOR, AND THEREFORE THE BOARD'S REFUSAL TO RE-OPEN HIS CLASSIFICATION WAS ARBITRARY AND A DENIAL WITHOUT DUE PROCESS OF LAW OF APPELLANT'S APPEARANCE AND APPEAL RIGHTS UNDER THEN EXISTING SELECTIVE SERVICE REGULATIONS, THEREBY INVALIDATING HIS INDUCTION ORDER AND HIS CONVICTION.

1. As heretofore noted, S.S. Regulation §1625.2 permits a Local Board to re-open a registrant's classification when his request--

> ". . . is accompanied by written information presenting facts not considered when a registrant is classified, which, if true, would justify a change in the registrant's classification. . ." [6]

---

6. §1625.2 also provides that no classification shall be re-opened after the mailing of an induction notice unless the local board specifically finds a change in the registrant's status resulting from circumstances beyond his control.

That proviso is not pertinent here because the local board, by placing its refusal to re-open on the sole (cont.)

2. When a classification is re-opened and considered anew, the resultant classification has the effect of an original classification, even though the registrant is placed in the same class as before reopening.

Selective Service Regulation §1625.11;

See: Miller v. United States, C.A. 9, 1967, 388 F.2d 973.

3. Each such re-classification is "followed by the same right of appearance before the Local Board and the same right of appeal as in the case of an original classification."

Selective Service Regulation §1625.13;

See: United States v. Freeman, C.A. 7, 1967, 388 F.2d 246;

---

6. (cont.) ground that the "new information does not warrant reopening of classification" (S.S.F. 14), appears thereby to have treated appellant's claim as an application filed prior to the mailing of his induction notice.

Implicit in the board's notation is its acknowledgement that the acquisition of conscientious objector beliefs arises from circumstances beyond a registrant's control. Such is also the view taken by courts of other circuits (United States v. Federspiel [N.D. Ohio, 2/19/68], No. C.R. 240; United States v. Baker [E.D.N.Y., 2/19/68] 67 CR 19; see also: Boswell v. United States, C.A. 9, 1965, 330 F.2d 181.)

Olvera v. United States, C.A. 5th, 1955, 223 F.2d 880.

4. Moreover, at the time of appellant's application, and the Local Board's denial thereof, appellant was entitled to special appeal procedures reserved for conscientious objector claimants, including referral of such claims to the Department of Justice for investigation and recommendation, and a hearing before an impartial referee.

Selective Service Regulations §1626.25;

See: MacMurray v. United States, C.A. 9th, 1964, 330 F.2d 928.

5. These rights of appearance and appeal are a substantial and indispensable facet of the Selective Service classification system; and a conviction may not obtain under 50 U.S.C.A. App. §462, where such rights have been abrogated or denied by a Local Board.

Boswell v. United States, C.A. 9th, 1968, 390 F.2d 181;

MacMurray v. United States, supra, 330 F.2d 928;

United States v. Freeman, supra, 388 F.2d 246, 248;

United States v. Stepler, C.A. 3rd, 1958, 258 F.2d 310, 315;

////

Olvera v. United States, supra,
223 F.2d 880;
Striker v. Resor, D.C.N.J., 1968,
283 F.Supp. 923.

6. A Local Board may not arbitrarily refuse to reopen and reclassify a registrant even if ultimately the Board decides to retain him in the same class to which he had been assigned before re-opening.

See: Miller v. United States, supra,
388 F.2d 973;
Olvera v. United States, supra.

7. If a registrant seeking to have his case re-opened, submits new facts not previously presented which makes out a prima facie case for a different classification, the Local Board is required by law to re-open the case.

United States v. Walsh, D.C. Mass., 1968,
279 F.Supp. 115, 120;
Miller v. United States, supra;
Stain v. United States, C.A. 9th, 1956,
235 F.2d 339;
United States v. Freeman, supra,
388 F.2d 246, 249;
See: United States v. Garcia, D.C.C.D.Cal.,
1/22/68, No. 1265 (holding by
Judge Irving Hill re ministerial
exemption).

8. Appellant's letter seeking classification as a conscientious objector, and requesting a Form 150, arrived on the same day that the Local Board mailed him his order to report for induction (S.S.F. 13).

The Board mailed appellant a Form 150 on March 10, directing that it be completed and filed no later than March 8. It was; whereupon, the Board apparently treated the form as an application to re-open his classification, and conceded that the information provided therein was new.

Thus, the notation entered on March 10 in the minutes appended to appellant's questionnaire read:

> "Board members contacted file reviewed new information does not warrant re-opening of classification, Must report for Induction as ordered" (sic).

See: Miller v. United States, supra;
United States v. Baker, supra;
United States v. Burlich (D.C.N.Y., 1966), 257 F.Supp. 906;
United States v. Sobczak, D.C. Ga., 1966, 264 F.Supp. 752.

9. Appellant's claim having been filed prior to the enactment of the 1967 amendment to 50 U.S.C.A. App. 6(j), the principles enunciated in Seeger v. United States, 1965, 380 U.S. 163, 85 S.Ct. 850, would apply in determining

whether appellant made out a prima facie case for re-opening.

10. In his Form 150, appellant acknowledged belief in a Supreme Being, and described objection to war in relation thereto (S.S.F. 104-105). Appellant opposed war "because of its disrespect and irreverence for life" (S.S.F. 105), and rejected the use of force except where "controlled, non-violent [and] wholly to the specific goal"; that is, a force which is "creative" or helpful. Appellant also believed that force "derived from an impulse to self-preservation could be justified only if all other remedies are exhausted thoroughly."

Compare: Sicurella v. United States, 1955, 348 U.S. 385, 75 S.Ct. 403;
Kretchet v. United States, C.A. 9th 1960, 284 F.2d 561;
United States v. Sage, D.C. Neb., 1954, 118 F.Supp. 33.

While appellant did not claim membership in a religious sect or congregation at the time of filing his Form 150, such affiliation is not a prerequisite to classification as a conscientious objector.

Sicurella v. United States, supra;
Seeger v. United States, supra;
United States v. Alvies, N.D.Cal., 1963, 112 F.Supp. 618.

However, appellant did ascribe his conscientious objector beliefs to his religious "upbringing in the Jewish faith" as well as his medical training. [7]

See: United States v. Stolberg, C.A. 7th, 1965, 346 F.2d 363.

Tne mere fact that appellant had previously claimed and was given a II-A classification does not, of course, defeat his claim to a conscientious objector classification, not only because a II-A classification is lower tnan a I-O, and therefore takes priority, (S.S. Regulation §1623.2) but also because a registrant has a right to claim sucessive deferments on different grounds.

United States v. Peebles, C.A. 7th, 1955, 220 F.2d 114, 118.

11. It would thus appear that on its face, appellant's claim makes out a valid case for a classification as a conscientious objector; and therefore, the Board's failure to reopen his classification was arbitrary and constituted a denial of appellant's procedural rights

---

7. It may be noted that appellant had less than four days in which to complete and file the Form 150, rather than the 10 days usually allotted for this procedure. (See: The box in the upper right hand corner of appellant's questionnaire, S.S.F. 12).

////

without due process of law.

By reason thereof, appellant's induction notice was invalid and his conviction cannot stand.

III

THE INDUCTION NOTICE WAS INVALID AND VOID BECAUSE MAILED BEFORE THE EXPIRATION OF APPELLANT'S TIME FOR APPEAL HAD EXPIRED.

1. S.S. Regulation §1626.41 states:

"The local board shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the appeal board or during the period such an appeal is pending. Any order to report for induction which has been issued during either of such periods shall be ineffective and shall be cancelled by the local board. Whenever an appeal to the appeal board has been taken by a person entitled to do so, any order to report for induction which has previously been issued to the registrant shall be ineffective and shall be cancelled by the local board."

2. S.S. Regulation §1626.61(b) provides:

"At any time within 10 days after the

date when the local board mails to the registrant a Notice of Classification (SSS Form No. 110). . . or at any time before the registrant is mailed an Order to Report for Induction (SSS Form No. 252), the government appeal agent, if he deems it to be in the national interest or necessary to avoid an injustice, may prepare and place in the registrant's file a recommendation that the State Director of Selective Service either request the appeal board to reconsider its determination or appeal to the President. The registrant's file shall then be forwarded to the State Director of Selective Service.

* * *"

3. S.S. Regulation §1604.71 provides for government appeal agents, and establishes their duties, in pertinent part, as follows:

"(d) It shall be the duty of the government appeal agent. . .

"(1) to appeal. . . from any classification of a registrant by the local board which is brought to his attention and, in his

opinion, should be reviewed by the appeal board.

* * *

(5) to be equally diligent in protecting the interests of the government and the rights of the registrant in all matters." (Emphasis supplied.)

4. His internship having been completed, appellant sought (through his prospective employer) and received from the Board, a II-A classification (occupational deferment) to permit him to take up a one year residency training in pediatrics at the Cedars-Sinai Medical Center in Los Angeles (S.S.F. 13, 59-63, 70, 73-75).

It may be noted from the Board minutes appended to appellant's questionnaire (S.S.F. 13) that the II-A classification was granted on August 4, 1965; and that a handwritten notation appears after the date as follows:

"2a 8/66"

It is thus apparent that the Board intended to and did grant appellant an occupational deferment of at least one year, based in large part, presumably, upon the recommendations of Dr. Kagan, Director of Pediatrics at the Center (S.S.F. 59-60), and Dr. L. S. Goerke, Chairman of the Southern California Advisory Committee of the Selective Service System (S.S.F. 70).

5. For reasons not disclosed in this record, the State Director, on October 20, 1965, "recommended" that appellant be reclassified as available for service, i.e., I-A (S.S.F. 80).

6. Appellant was promptly ordered by the Board to report for pre-induction physical (S.S.F. 78-84), and he ultimately did so and was found acceptable (S.S.F. 81, 89).

7. On January 24, the Local Board reclassified appellant I-A (S.S.F. 13); and appellant filed a timely appeal (S.S.F. 13, 90).

8. Appellant's classification was affirmed by the Appeals Board on February 24, 1966, (S.S.F. 4) and on February 25, 1966, the Board mailed appellant SSS Form 110, notifying him of the Board of Appeals' decision (S.S.F. 13).

9. Three days later, on February 28, the Local Board mailed appellant an Order to Report for Induction on March 15, 1966.

10. In a criminal prosecution under the Universal Military Training and Service Act, the burden is on the government to establish the validity of the induction order, and on issues relating thereto, the record is to be viewed in the light most favorable to the accused.

Franks v. United States, C.A. 9th, 1954, 216 F.2d 266, 269.

11. Although the standard form 110 (Notice of Classification) advises a registrant of his right to seek

the advice of an appeal agent, it nowhere appears from this record that appellant did so.

More to the point, the record fails to show that the Local Board advised appellant that an appeals agent might, in an appropriate case, seek reconsideration of his appeal under Selective Service Regulations §1626.61(b). Since this was obviously an important and substantial right, the Board's omission deprived the appellant of due process of law.

United States v. Giescel, D.C.N.J., 1955, 129 F.Supp. 223;

United States v. Sobczak, D.C.Ga., 1966, 264 F.Supp. 752.

12. Appellant's Selective Service file discloses a plausible basis for an appeal agent's recommendation. Dr. Kagan's letter to the Board iterated a critical national need for pediatricians (S.S.F. 86-88); and appellant's reclassification in the middle of his residency, a few months after the promise of a one year deferment, makes out a prima facie case of hardship and injustice.

At least, the circumstances attendant the reclassification, coupled with what additional facts appellant may have provided the appeal agent, may well have led the latter to believe there was a genuine and sufficient basis for further review under Selective Service Regulations §1626.61(b).

13. By mailing the induction notice prematurely, and by failing to advise appellant of his rights under Selective Service Regulations §1626.61(b), the Local Board deprived appellant of the opportunity and possibility of securing a change in his classification through an appeal agent, and thereby vitiated its induction order.

United States v. Steppler, C.A. 3rd, 1958, 258 F.2d 310, 315.

14. Moreover, appellant's time for appeal under Selective Service Regulations §1626.61(b) had clearly not yet expired when the Board mailed his induction notice. Therefore, by virtue of Regulation §1626.41, the Board's induction order, mailed only three days after the mailing of appellant's Notice of Classification (Form 110), was "ineffective and void.

See: United States v. Hertlein, D.C. Wisc., 1956, 143 F.Supp. 742, 745-746;

Compare: Striker v. Resor, supra, 283 F.Supp. 923.

15. Accordingly, the evidence is insufficient in that, on this record, appellant was under no duty to submit to induction as charged by the indictment; and his conviction must be reversed.

/

/

/

/

CONCLUSION

For all of the foregoing reasons, appellant respectfully submits that his conviction should be set aside, and an order be made directing the trial court to enter a judgment of acquittal.

Respectfully submitted,

David B. Finkel

DAVID B. FINKEL
Attorney for Appellant

HUGH R. MANES, Of Counsel

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

David B. Finkel

DAVID B. FINKEL